

Resolution No.: 15-959
Introduced: April 12, 2005
Adopted: April 12, 2005

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
IN MONTGOMERY COUNTY**

By: County Council

SUBJECT: APPLICATION NO. G-822 FOR AMENDMENT TO THE ZONING ORDINANCE MAP, Stephen Z. Kaufman, Esquire and Yum Yu Cheng, Esquire, Attorneys for Applicant, Oxbridge Development at Rock Creek, LC, OPINION AND RESOLUTION ON APPLICATION

Tax Account Nos. 04-00053428 and 04-00054035

OPINION

Application No. G-822, filed on March 30, 2004, by Applicant Oxbridge Development at Rock Creek, LC, requests reclassification from the existing R-90 and R-200 Zones (Residential- single family homes) to the R-T 8 Zone (Residential Townhouse, with maximum of 8 units per acre) of 5.6872 acres of land. The subject site is comprised of all of Parcel N895 and a portion of Parcel N951, and it is located in Aspen Hill, in the 4th Election District, on the west side of Baltimore Road, adjoining the City of Rockville corporate limits. The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits the filing of a Schematic Development Plan (SDP), containing binding limitations with respect to land use, density and development standards or staging. Applicant proposes to build a development called "Rock Creek Woods," with thirty new townhomes, and to dedicate a portion of the property to parkland.

The Hearing Examiner recommended approval of the application on the basis that the R-T 8 Zone at the proposed location would satisfy the requirements of the purpose clause; that the proposed reclassification and development would be compatible with existing and planned land uses in the

surrounding area; and that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. To avoid unnecessary detail in this Resolution, the Hearing Examiner's Report and Recommendation dated March 15, 2005 is incorporated herein by reference. Technical Staff of the Maryland-National Capital Park and Planning Commission ("M-NCPPC") recommended denial of rezoning because they believed that the proposal did not comply with the Purpose Clause of the R-T 8 Zone and was not in conformance with recommendations of the *1994 Aspen Hill Master Plan*. The Montgomery County Planning Board ("Planning Board") took no position because its vote was split 2 to 2, and it was therefore unable to adopt a majority position.

A public hearing was convened on December 6, 2004, at which time the Applicant presented evidence and testimony in support of the application. There was no opposition testimony from the community, although three letters in opposition had been filed, two by nearby residents and a third by the City of Rockville. Martin Klauber, the People's Counsel, participated in the hearing and supported the application, as did the adjacent Tikvat Israel Congregation (a part owner of the subject site), which sent a letter in support and produced supporting lay and expert testimony. The nearby Ashleigh Woods Homeowner's Association filed a letter supporting the rezoning and requesting installation of "traffic calming measures" along Baltimore Road. Technical Staff testified at the request of the Hearing Examiner.

Although the District Council has given serious consideration to the concerns raised by two neighbors, the City of Rockville and the Technical Staff, it finds, based on its review of the entire record, that the application does meet the standards required for approval of the requested rezoning for the reasons set forth by the Hearing Examiner. When the Planning Board conducts site plan and subdivision review, it has the discretion to address the question of whether a smaller number of townhouse units (*i.e.*, a lower density than the maximum of 30 units proposed by Applicant) or some other alignment of the units would alleviate some of the environmental concerns that have been raised in this case.

The subject site is located on the west side of Baltimore Road, approximately 1,850 feet south of its intersection with Parkvale Road and 1,300 feet north of Twinbrook Parkway, in Aspen Hill, adjoining the City of Rockville corporate limits. Two parcels comprise the subject property, Parcel N895 in its entirety (the Pickett property) and the northwestern portion of Parcel N 951 (the synagogue property). Parcel N895 consists of approximately 3.56 acres of R-90 and R-200 zoned land, and the northwestern portion of Parcel N951 consists of approximately 2.12 acres of R-200 zoned land. The remaining portion of parcel N951 consists of 3.71 acres and is developed with an institutional use, the Tikvat Israel Congregation. The Applicant has contracts to purchase the northwestern half of parcel N951 and all of parcel N895, and intends to subdivide both parcels into one parcel consisting of 5.68 acres.

The property has approximately 465 feet of frontage on Baltimore Road and a maximum depth of approximately 400 feet. The Pickett property contains a single family house, but most of the property is undeveloped. Access to this dwelling unit is from a gravel driveway that travels through Rock Creek Park and connects to Baltimore Road. The Pickett property is mostly forested, containing many large, mature trees, several specimen trees, outcroppings and steep slopes along the site's frontage on Baltimore Road. The property slopes up from Baltimore Road at approximately a 25% rate and then flattens out to a gentler slope along its northern and western property lines.

The subject portion of Parcel N951 is undeveloped and contains gentle slopes, trees and wildlife. The southeastern portion of Parcel N951 is developed with the Tikvat Israel Congregation and associated parking. The City of Rockville's corporate limits zigzag around the southern border of Parcel N951.

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The "surrounding area" in this case is bounded by Norbeck Road (MD 28) to the north, Bauer Drive, Greenspan Lane, and a line through Rock Creek Regional Park to Twinbrook Parkway on the east; Twinbrook Parkway, Shetland Street, Forbes Street, Flethcher Place, Broadwood Drive and the

northern property line of Rockville Cemetery on the south; and a line from Rockville Cemetery to the Avery Road and Norbeck Road intersection on the west.

The property north and east of the subject site is zoned R-90 and R-200 and is developed as Rock Creek Regional Park, which is owned by the Maryland–National Capital Park and Planning Commission (M-NCPPC). Beyond the park and north along Baltimore Road, the properties are developed with the Rock Creek Manor Townhomes, zoned RT-12.5, the North Creek Villas and North Creek Place Condominiums (multi-family communities, zoned R-20 and R-30), the Rock Creek Village Shopping Center, zoned C-1, the Townes of North Creek townhouses, and single family detached dwelling units, zoned R-90 and located in Rock Creek Manor, west of Bauer Drive.

To the south and abutting the subject site, the property is split zoned R-90 and R-200 and developed with the Tikvat Israel Congregation. The southern property line for the synagogue delineates the corporate limits for the City of Rockville. South of the synagogue, along Baltimore Road and within the City limits, the properties are developed with Rockville High School, multi-family dwelling units (the Forest Park Apartments and the Woodedge Apartments) and an institutional use, the Maus-Warfield Armory.

East of the subject site, and across Baltimore Road, is the Rock Creek Regional Park. The City of Rockville corporate limits are directly south of the park, and development along the east side of Baltimore Road includes townhouses (Ashleigh Woods), and institutional uses, the Asbury Methodist Church, the Twinbrook Baptist Church, and the Meadow Hall elementary school.

At the intersection of Twinbrook Parkway and Baltimore Road is the Mental Health Association of Montgomery County, and south of that, city owned open space. Between Twinbrook Parkway and Broadwood Drive the uses include single-family detached dwellings bordering Shetland Street, Forbes Street and Fletcher Place.

The subject property was classified in the R-90 Zone by the 1954 Countywide comprehensive zoning. The R-90 Zone was reaffirmed by the 1958 Countywide comprehensive zoning. The current R-90 and R-200 Zones were approved by SMA-G-709 on July 19, 1994.

The Applicant seeks to have the subject site reclassified from its current R-90 and R-200 Zones to the R-T 8 Zone so that it can construct a maximum of thirty residential townhouse units, called "Rock Creek Woods" along the western portion of the 5.6872 acre subject site. Applicant has committed to dedicating about 1.5 acres of forest in the eastern portion of the site to parkland (or to a conservation easement, if the Planning Board prefers), as shown in the binding elements of its revised Schematic Development Plan (SDP).

Each of the 30 townhouse units will have a two-car garage, and there will be 12 surface (guest) parking spaces (bringing the total parking to 72 spaces), one tot lot, one play area and a gazebo. Access to the site would be from Baltimore Road via a private roadway. No phasing schedule for construction of the development is proposed. Applicant did not plan to include any Moderately Priced Dwelling Units (MPDU's) because the requirement for MPDU's did not apply to developments of fewer than 35 dwelling units until April 1, 2005. However, effective on that date, amendments Montgomery County Code §25A-5(a) expanded the applicability of the MPDU requirements to all residential developments of 20 or more units submitted for approval of a preliminary plan of subdivision. Thus, 4 of the 30 units (*i.e.*, 12.5%) would have to be MPDU's, pursuant to Montgomery County Code §25A-5(c).

Applicant's planned private roadway will be 20 feet wide, with sidewalks and parking areas, and will connect with Baltimore Road at the synagogue property line. In addition to the forest retention mentioned above, Applicant promises to locate trees along Baltimore Road and along the road serving the site. Landscaping will be installed along the southwestern property line adjacent to Rockville High School and along the southeastern property line adjacent to the synagogue. A retaining wall and screening fence will be located between the subject site and the synagogue along with a buffer strip of evergreen trees.

Baltimore Road will be improved along the subject property's frontage in accordance with County standards. These improvements will include widening pavement on the west side of the road to 18 feet from the road's centerline, with curb, gutter, a required storm drainage system and a 5-foot-wide sidewalk.

The Applicant in the present case has proposed binding elements which limit development to a maximum of 30 townhouses (*i.e.* maximum density of about 5.3 dwelling units per acre), with all required MPDU's, a building coverage of 13%, 68% green area, 72 parking spaces, a minimum setback of approximately 220 feet from the public street and 30 feet from the adjacent single family residential zone, and dedication to parkland (or a conservation easement, at the Planning Board's discretion) of 1.53 acres of forest retention. In addition to these binding elements, Applicant promises in "Notes" on the SDP to implement reasonable traffic calming measures at subdivision and to implement mitigation measures recommended in the arborist's report to save specified trees.

The proposed development will meet, and in some instances exceed, the applicable development standards for the R-T 8 Zone. For example, maximum density is set at 8 units per acre, but Applicant's proposal calls for a density of only 5.3 units per acre. Maximum building coverage is specified as 35%, but Applicant has committed to a maximum coverage of 13%. Minimum green space in the zone is specified as 50%, but Applicant will have at least 68% green space. Although only 60 parking spaces are required by statute, Applicant plans on 72 spaces.

A floating zone, such as the R-T 8 Zone, is flexible device, and individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location satisfies the purpose clause for the zone, that the development would be compatible with the surrounding area, and that it would serve the public interest. *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967).

Under the "purpose clause" set forth in Zoning Code §59-C-1.721, the R-T Zone may be applied if a proposal meets any one of three alternative criteria: (1) it is in an areas designated for R-T Zone densities (implying a master plan designation); (2) it is in area that is appropriate for residential development at

densities that are allowed in the R-T Zones; or (3) it is in an area where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.

Since the Master Plan does not designate the subject site for the R-T Zone and the nature of the surrounding properties does not allow this project to meet the precise statutory language for a transition from commercial or industrial uses, this case turns on whether the proposed development is “appropriate” for development at densities allowed in the R-T Zones. The Technical Staff says “no,” based on its environmental concerns, but the weight of the evidence demonstrates that development at a lower density would, paradoxically, have a greater potential for harming the environment due to the additional grading that would be required.

The District Council finds that the subject site is appropriate for the proposed development because the Master Plan encourages a wide choice of housing types, with the objective of maintaining and enhancing the quality of housing in the neighborhoods; the proposed townhouses would not be located adjacent to single family detached homes, but rather next to an institutional use, a synagogue, which supports the application; the subject site is located in an area of low to medium density townhouses, multifamily development, institutional uses and public uses; the density of the property across Baltimore Road, the Ashleigh Woods townhouse community, is seven-and-a-half units to the acre, and the townhouse development to the north, Rock Creek Manor Townhomes, is zoned at twelve-and-a-half units to the acre; the subject property is proposed for townhouse development at a density of 5.3 units to the acre, which is lower than, but compatible and consistent with, existing densities in the area; the proposed townhouses would be convenient to a synagogue, schools, parks, churches, other townhouses and shopping, thereby creating a “walkable” community and enhancing the neighborhood; and the proposed development would not be a problem because of noise, fumes, excessive traffic or other adverse effects on the community.

The Council recognizes that the subject site was not “designated” for the R-T Zone by the applicable *1994 Aspen Hill Master Plan*, but the Master Plan is a guide, not a requirement where, as here, the Zoning Ordinance does not make it mandatory. See *Richmarr Holly Hills, Inc. v. American PCS, L.P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997). Although there is no specific guidance in the written portion of the Master Plan for this property, the Master Plan supports current zoning where it does not recommend changes, and its “Land Use Plan” recommends about two thirds of the subject site for parkland (all of the Pickett property and half of the synagogue property) and one third for “Church and Institutional.” However, on page 181 of the Master Plan, there is a notation that “[t]he Department of Parks has no current plans for additional parkland acquisitions.” The Master Plan also notes that “this does not preclude an investigation of sites when specifically requested,” but years have passed and the M-NCPPC has not yet acquired the property for parkland. The owners should not be precluded from developing their property while waiting for that to happen, so the Council does not take the parkland recommendation in the Master Plan’s Land Use Map as preclusive of other appropriate development. It should be noted that Applicant has committed in a binding element to dedicate 1.53 acres of forest retention on the property to parkland (or to a conservation easement, at the Planning Board’s discretion).

In deciding that the proposed development is appropriate for the R-T 8 Zone, the Council also considered arguments made by Technical Staff and the City of Rockville that townhouses should not be located next to parkland and that this development might be harmful to the environment. Although the proposed development does not meet the definition of “transitional” contained in the R-T Zone’s Purpose Clause, that does not make its location next to parkland inappropriate. This Council, on at least three prior occasions, has approved townhouse developments abutting parkland under conditions similar to the instant one. See, Resolution No. 9-1851, adopted on June 15, 1982, granting the reclassification of approximately 3.0290 acres of land located adjacent to the Cabin John Regional Park from the R-90 Zone to the RT-6 Zone; Resolution No. 8-1500, adopted on August 23, 1977, granting the reclassification of approximately

6.5102 acres of land located adjacent to the Rock Creek Park from the R-200 Zone to the R-T Zone; and Resolution No. 5-2137, adopted on September 21, 1965, granting the reclassification of approximately 8.4420 acres of land located adjacent to the Cabin John Regional Park from the R-90 Zone to the R-T Zone.

The environmental concerns raised in this case have also been considered by the District Council. Applicant presented a great deal of evidence to refute Technical Staff's contention that a townhouse development at the proposed density will not be friendly to the environment. The issues raised by Technical Staff, as well as Applicant's responses, in brief, are set forth below as they appeared in Exhibit 60:

- 1) **Issue:** The proposed area of disturbance (5.33 acres) is considerable.

Response: This is incorrect. The area of disturbance for the proposed townhouse development is 4.32 acres, less than 50% of the site. The area of disturbance for a single-family development, which is permitted by right, is greater.

- 2) **Issue:** There will be a permanent loss of priority forest.

Response: The proposed townhouse community use would result in less loss of forest than would result from a single-family development under the current zoning.

- 3) **Issue:** There will be disturbance of critical root zones of significant specimen trees located on adjacent parkland.

Response: Based upon the level of disturbances within the critical root zones of these off-site trees (a total of 5), it is reasonable to expect that these trees would all survive, and impact minimization and mitigation efforts to be employed during the detailed site design would further improve their survivability.

- 4) **Issue:** There will be impact to a stream valley buffer.

Response: The only impact to the stream valley buffer proposed is associated with the required improvements along Baltimore Road, which would be required under either the townhouse or single-family house development scenario.

- 5) **Issue:** There will be impact to shallow soils with patches of exposed bedrock, associated with steep slopes.

Response: The proposed townhouse use would result in less disturbance to these areas than development under the current zoning. Impacts to these areas (limited to the eastern portion of the site) have been minimized, and are limited to access road and utility connections, which would be required for any development of the site.

- 6) **Issue:** There is potential for wind-throw of 'saved' trees within the Category 1 conservation easement following site development.

Response: We have seen no evidence that this is a concern uniquely or significantly relevant to this site. However, because the proposed townhouse use would result in less forest clearing than development of the site under existing zoning, the townhouse use would better address this concern by providing a larger contiguous retained forest area.

- 7) **Issue:** There will be moderate to severe erosion hazard and severe limitations to site development.

Response: This is a general observation regarding site constraints and is not particular to the proposed townhouse use. Because the proposed townhouse use would result in less disturbance than the single-family development under existing zoning, the townhouse use would better address this concern.

- 8) **Issue:** There is potential for increased sheet flow from the property on to Baltimore Road.

Response: The proposed development provides for storm drain improvements which will directly convey runoff from the site to the eastern (downstream) side of Baltimore Road, thus eliminating significantly the existing sheet flow issue.

Based on the evidence of record, as presented in the Hearing Examiner's report, the District Council finds that the proposed townhouse development would be less intrusive on the environment than the single-family detached development illustrated at the hearing. Moreover, even without reference to the comparison generated by Applicant, the District Council must take into consideration that the site is not located in a Special Protection Area, that there are no wetlands on the property, that the storm water management concept plan was approved by the Department of Permitting Services (DPS), and that, by Technical Staff's own admission, "[t]he proposed development meets the technical requirements of the Forest Conservation Law." Technical Staff report (Exhibit 43), at page 10. Considering all the evidence, including these factors and the responses of Applicant's experts to the concerns raised by Technical Staff, the Council cannot find the proposed development to be inappropriate based on its environmental impact.

The choice is not between development and no development. The Master Plan recommends classifying the subject site as part Institutional and part Parkland, but the County has not acquired any of it for parkland, and the owners have the right to develop the land under the current zone for single family

detached homes. If the owners of the land in question are restricted to developing the land with single family detached homes in accordance with the Zoning Ordinance, the impact on the environment may well be worse than the present plan. That is what the evidence shows. Moreover, under the Applicant's proposal, a significant portion of the land will be dedicated to parkland, or put in a conservation easement, at the Planning Board's discretion. This outcome is assured by a binding element on the SDP.

For all these reasons, the District Council finds that the subject site is appropriate for residential development at densities that are allowed in the R-T Zones.

The second prong of the "floating zone" standards is compatibility. Even though Technical Staff has the above-mentioned reservations about the possible environmental impact of the proposed development, it concedes that "the proposed development may be compatible in terms of uses and density with nearby townhouse developments." Exhibit 43 at page 8.

The Applicant's expert land planner, James Crawford, testified that, in his opinion, the proposed Zone would be compatible both with the existing uses, including the parkland, and with the proposed uses set forth in the Master Plan. Tr. 78-79. Applicant's civil engineer, Michael Snyder, testified that from an engineering point of view, this development is compatible with the surrounding uses in the area. Tr. 137. Alfred S. Blumberg, the expert land planner employed by the neighboring synagogue, testified that because this is a floating zone case, compatibility "is a primary issue." Tr. 120-121. He agreed with Technical Staff's conclusion that a townhouse development at the subject site would be compatible with surrounding uses. In his opinion, that compatibility extends to having townhouses located adjacent to parkland, which he felt was quite appropriate. Tr. 117.

Based on this evidence, the District Council finds that the proposed development would be compatible with surrounding uses and with the adjacent parkland. Thus, reclassification to the R-T 8 Zone and the development proposed would be compatible with existing and proposed development in the surrounding area.

Finally, the Applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities. The Land Use Plan from the applicable Master Plan lists most of the subject site as parkland, not developable property. Since M-NCPPC has failed to acquire it as parkland and since the owner of the Pickett property has the right to develop it in its current single-family detached zone in a way that might be less desirable from an environmental standpoint, the Master Plan's reference to using it as parkland is not a reliable indication of the public interest in this case. Moreover, the Master Plan's recommendation for a parkland use would be at least partially accomplished by Applicant's binding commitment to dedicating over 1.5 acres of the subject site to parkland use.

The Planning Board could not reach a majority position in this case, and Technical Staff recommended against approval for reasons which have already been discussed at some length, but which are overcome by the weight of the evidence in this case.

As to the impact on public facilities, the evidence indicates that the 30 dwelling units proposed here are expected to generate only 4 high school students, 3 middle school students and 6 elementary school students. Montgomery County Public Schools indicates that enrollment in the Rockville school cluster will be within capacity for the entire forecast period, and that the current AGP schools test also finds capacity adequate in the cluster.

The evidence also supports the conclusion that the impact on local traffic from this development would be minimal (*i.e.*, under the 30 peak hour trips required to generate the need for a traffic study) and would be ameliorated by road improvements, traffic calming devices and safety measures to be undertaken by Applicant. No evidence was presented to suggest that the proposed development would have any adverse effect on utilities or other public services.

For all of these reasons, the District Council concludes, based on the preponderance of the evidence, that the proposed reclassification and development would have no adverse effects on public facilities and that approval of the requested zoning reclassification would be in the public interest.

Based on the foregoing analysis and the Hearing Examiner's report, which is incorporated herein, and after a thorough review of the entire record, the District Council concludes that the application satisfies the requirements of the purpose clause; that the application proposes a form of development that would be compatible with existing and planned land uses in the surrounding area; and that the requested reclassification to the R-T 8 Zone bears sufficient relationship to the public interest to justify its approval. For these reasons and because approval of the instant zoning application will aid in the accomplishment of a coordinated, comprehensive, adjusted, and systematic development of the Maryland-Washington Regional District, the application will be approved in the manner set forth below.

Because neither the Master Plan nor the Planning Board recommended the reclassification sought, the Zoning Ordinance requires an affirmative vote of 6 members of the Council for approval. Zoning Ordinance §59-H-8.2(b). Thus, the subject application has been approved by an affirmative vote of at least 6 Council members.

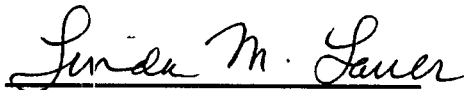
ACTION

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Zoning Application No. G-822, requesting reclassification from the R-90 and R-200 Zones to the R-T 8 Zone of 5.6872 acres of land, known as Parcel N895 and a portion of parcel N951 and located in the 4th Election District on the west side of Baltimore Road, approximately 1,850 feet south of its intersection with Parkvale Road and 1,300 feet north of Twinbrook Parkway, in Aspen Hill, adjoining the City of Rockville corporate limits, is hereby approved in the amount requested and subject to the

specifications and requirements of the final Schematic Development Plan, Ex. 69(b); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan approved by the District Council within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance.

This is a correct copy of Council action.

A handwritten signature in cursive script that reads "Linda M. Lauer".

Linda M. Lauer, Clerk of the Council